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Before the
Federal Communications Commission
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of

Children's Television Obligations of
Digital Television Broadcasters

MM Docket No. 00-177

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To: The Commission

PETITION FOR RECONSIDERATION

Maranatha Broadcasting Company, Inc. ("MBC"), licensee of independent television broadcast station WFMZ-TV, Channel 69, Allentown, Pennsylvania, and digital television broadcast station WFMZ-DT, Channel 46, through counsel and pursuant to Section 405 of the Communications Act and Section 1.429 of the FCC's rules, hereby petitions the FCC to reconsider its *Report and Order and Further Notice of Proposed Rule Making* in MM Docket No.00-177, *Children's Television Obligations of Digital Television Broadcasters*, FCC 04-221, released November 23, 2004 (70 Fed. Reg. 25, January 3, 2005) (the "CTV R&O").

MBC was one of the first independent television station licensees to embrace the transition to digital broadcasting, beginning operation of WFMZ-DT in June 1999. It provides three free, over-the-air programming channels: a standard definition simulcast of WFMZ-TV (including 59 local newscasts each week), a 24-hour, seven-day a week high-definition programming service from HD Net (including original sports, news, music and entertainment programs), and a 24-hour-a-day weather reporting and forecasting service

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from AccuWeather.¹ WFMZ-DT's commitment to digital broadcasting, therefore, equals or surpasses the offerings of most network-affiliated television stations.

The *CTV R&O* imposes several new regulatory burdens on digital television broadcasters, including: (1) a requirement to provide three hours of children's educational and informational programming for each full-time channel of free video programming (to be subject to the commercial limits and other policies applicable to programming directed at children ages 12 and under); (2) an expanded definition of "commercial matter" to include promotional announcements for television programs or other video services *other than* children's educational and informational programming, and (3) interpretation of the commercial time limits to include displays of Internet web site addresses unless the web site offers "a substantial amount of *bona fide* program-related or other noncommercial content and is not intended primarily for commercial purposes." *CTV R&O*, *supra*, ¶ 2.

These new burdens reflect an unrealistic and irrationally narrow vision of what constitutes the public interest that will, ultimately, depress both the number, quality and diversity of free digital *and* analog programming services.

The *CTV R&O* infers the FCC's authority to impose these sweeping additional programming requirements from Section 336 of the Communications Act, which provides – without mentioning children's television programming – that a television renewal applicant must "establish that all of its program services on the existing or advanced television spectrum are in the public interest." The notion that a television station can't

¹ HDNet recently suspended satellite delivery of its programming. WFMZ-DT is installing a local server to receive HDNet's programming and will resume broadcasts of the HDNet schedule shortly

serve the public interest without broadcasting at least three hours per week of educational and informational programming for children for every channel of digital programming is false and presumptuous.

In addition to three to three-and-a half hours each week of children's educational and informational programming, WFMZ-TV, as previously noted, broadcasts 59 half-hour local newscasts each week. All of these newscasts are simulcast on a standard definition channel on WFMZ-DT. Five of those newscasts, *Edicion En Espanol*, at 11:00 p.m., Monday-Friday, are the only full half-hour Spanish-language newscasts in the Philadelphia television market. That programming is certainly "in the public interest." So is WFMZ-DT's 24-hour a day weather service from AccuWeather, and so is WFMZ-DT's 24-hour a day high definition programming service from HDNet, which, according to the HDNet web site, www.hd.net, produces more original sports, news, music and entertainment programming than any domestic television network. An expanded and more diverse supply of free high-quality high-definition and other digital programming increases the public's incentive to purchase digital television receivers and speeds the transition from analog to digital broadcasting.

MBC is able to provide this public interest programming even though much of it is not remunerative. The Spanish-language newscasts, beginning their third year, are approaching a break-even condition but still cost more to produce than they attract in advertising and must be subsidized by other operations. WFMZ-TV's children's programming produces no revenue whatsoever. To advertisers and among the public, WFMZ-TV is known as a news and information station. While advertising clients who are interested in news can sometimes be interested in purchasing time in general entertainment programming, and some

advertising clients have products that can be sold in syndicated programs such as "Judge Judy," "Family Feud" and "Family Matters," local advertisers have no interest in WFMZ-TV's children's programs. WFMZ-TV receives some national advertising dollars through regional advertising buys but those dollars are spent on time in the station's most highly-viewed programs, with low or no ratings attributable to children's programming, no dollars are attracted to it. (National advertisers include companies such as automobile makers and other manufacturers who have no practical interest in marketing to children.)

Neither does MBC realize significant revenue from WFMZ-DT's high-definition channel or the AccuWeather service. The high-definition channel has produced no advertising dollars to date; the AccuWeather service, while self-supporting, does not produce sufficient revenue to subsidize other, unprofitable programming. Roughly eighty-five percent of TV households in the Philadelphia market subscribe to cable television or DBS service. While WFMZ-TV is carried on most cable television systems in the Philadelphia market, and is available to subscribers of the local service packages of the two major DBS providers, the AccuWeather service is available to basic subscribers of only two cable systems, and the high definition service on only one. As a matter of necessity, WFMZ-TV's news and entertainment programming, therefore, must sustain not only the unremunerative children's educational and informational programming but also WFMZ-DT's high-definition channel – and all of the capital costs associated with the conversion to digital broadcasting.

The CTV R&O imposes new regulatory burdens that threaten MBC's continued ability to serve the public interest through diverse analog and digital programming. A three-hour bloc of children's programming is incompatible with a 24-hour weather service and only substitutes one type of public-interest programming for another, with no net gain to the public

interest. Moreover, MBC is unaware of any high-quality, high-definition children's programs available to independent stations through syndication at the present time. Even assuming the availability and compatibility of children's programming for WFMZ-DT's supplementary weather and high-definition programming channels, the necessity to integrate unremunerative children's programming into those programming services would (1) accentuate the financial loss associated with the high-definition channel and (2) tip the marginally self-sustaining weather service into the loss column.

The "choices" offered by the *CTV R&O* are either antithetical to the broader public interest or no choice at all. One possible response would be for independent stations such as WFMZ-DT to offer only data or other niche ancillary and supplemental services on a subscription basis -- thus avoiding the necessity to provide any additional children's programming -- and abandon the effort to provide free public interest digital programming that serves and appeals to a broad spectrum of the community. The second possible response -- to meet the licensee's new children's programming obligations on a single channel (which "has comparable carriage on multi-channel video programming distributors . . . as the stream whose programming generates the core programming obligation"), *CTV R&O*, ¶ 24 -- would effectively require MBC to substitute six hours a week of additional unremunerative children's programming for six hours a week of revenue-generating news and/or general entertainment programming on WFMZ-TV. The resulting revenue loss would make it more difficult for WFMZ-TV to support the operating losses and capital expenses associated with the transition to digital television. Of at least equal importance, it would diminish MBC's ability to sustain unprofitable programming, such as its daily Spanish-language newscasts -- which are clearly in the public interest -- and could result in the

termination of that programming service altogether. The potential negative consequences are made more severe by the *CTV R&O*'s more expansive definition and interpretation of what is "commercial matter." Under those new standards, not only will MBC be required to air more children's programming without hope of realizing any additional revenue, it will also be denied the opportunity to use time within that programming to promote those station programs – and even the station web site – that provide the revenue necessary to support children's programming, other unprofitable public interest programming, and the digital transition.

A possible resolution – but not one permitted under the *CTV R&O* – to the problem of accommodating required programming not compatible with the weather and high-definition services would be the creation of another standard definition channel that would include all of WFMZ-DT's required children's programming. The *CTV R&O*, however, as noted above, requires the children's programming to be broadcast on a channel with cable and satellite carriage comparable to the program channel generating the programming obligation. WFMZ-DT's weather and high definition services do have some cable carriage, albeit on only a few systems. A new children's programming channel would start with no cable penetration and – without a multi-casting must-carry rule – no means to ensure carriage. Hence, unless the FCC adopts a multi-casting must-carry rule, a responsible solution to the compatibility problems posed by the *CTV R&O* is foreclosed.

If the FCC does not reconsider these onerous new requirements, the likely results are (1) transition of digital broadcasting from free programming to pay or subscription services and/or (2) a reduction in the quantity and quality of other public interest programming not specifically directed at children ages 16 and under.

The burdens of the new children's programming rules on independent stations are compounded, and made confiscatory and discriminatory, by the FCC's failure to guarantee that cable subscribers will have access to the newly-mandated programming. Under the new rules, stations must provide the programming but cable operators are not required to carry any digital channels so long as stations are engaged in analog broadcasting and, as the rules currently now stand, will not – even when the transition to digital broadcasting is complete -- be required to carry supplementary digital programming channels, only each station's "primary" digital programming service. The FCC thus requires licensees to provide children's programming on multiple channels, but refuses to ensure that the eighty-five percent of the public who subscribe to cable or another multi-channel video programming distributor will have access to that programming. It imposes a permanent servitude on free digital programming for children's television but denies independent stations – the intended beneficiaries of the 1996 Telecommunications Act's must-carry requirements – the ability to grow audiences capable of sustaining that programming.

The discriminatory effect is highlighted by "negotiated agreements" such as the recently announced agreement between NCTA and the Association of Public Television Stations, guaranteeing that cable operators will carry at least four digital programming channels from each of the nation's public television stations. MBC has demonstrated – through its early implementation of digital broadcasting and its expanded digital services – that its commitment to the DTV transition has been as strong as that of any public television station and its programming is just as compelling. The imposition of new programming obligations on independent stations without ensuring that the public will have access to that programming, while cable operators guarantee access to the public stations that compete

with independent stations for audiences, is not simply discriminatory but anti-competitive. It is inimical to the public interest.

In 1971, the economist and jurist Richard Posner coined the phrase "taxation by regulation." (Posner, Richard A., *Taxation by Regulation*, 2 Bell Journal of Economics (1971).) It is a particularly apt term for the FCC's children's programming regulations. Through regulation, the FCC has created a permanent internal subsidy for unremunerative programming out of profits from other services. The additional "children's programming tax" levied by the *CTV R&O* is particularly burdensome for independent television station operators, and is made more discriminatory and anti-competitive by the FCC's failure to create a level playing field on which independent television stations can compete with network affiliates and public television stations. It is made more objectionable because it potentially forces licensees to sacrifice different types of public interest programming in favor of the programming favored by the FCC.

On reconsideration, the *CTV R&O*'s new programming obligations for independent stations should be scaled back radically if not discarded altogether. New children's programming obligations for free supplementary or ancillary digital programming services, if any, should be imposed only in a context – multi-casting must-carry rules – in which (1) the entire public will have access to all of the free programming offered by independent digital

television stations and (2) the burden of providing additional children's programming will not discriminate against independent stations or produce anti-competitive effects.

Respectfully submitted,

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